NOVEMBER 24, 1956

THE

SOLICITORS' JOURNAL

VOLUME 100

NUMBER 47

CURRENT TOPICS

Trial by Jury

IN the first of a series of four Hamlyn lectures on "Trial by Jury," Mr. Justice DEVLIN, on 14th November, said that its invention by a lawyer was inconceivable. It worked because it had been made to in practice. He said that the criminal verdict was based on the absence of reasonable doubt. A dissenting minority of a third or a quarter would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the verdict. The eccentric juryman in a minority of one, delighting in the power of the veto, was a nuisance, but did not turn up often. The property qualification would be intolerable but for the fall in the value of money. But if the rule that a jury should be unanimous was insisted on, it might be dangerous to remove that qualification; further, juries should be taken from the middle of the community where safe judgment was most likely to repose. He said that, as a rule, the Press was extremely careful, but one danger remained: in preliminary proceedings before a criminal trial evidence might be admitted, and therefore properly published in the Press, and thereafter excluded at the trial as inadmissible. It might be a wise precaution for the defence to ask in the earlier proceedings that evidence considered objectionable should not be published; and it was very likely that the Press would comply. Further lectures in the series, to which admission is free and without ticket, are to be given by Mr. Justice Devlin in the Beveridge Hall in the University of London Senate House, Market Street, W.C.1, on 21st and 28th November and 5th December.

Common Courtesy

IT is not in a spirit of reproof, but only because we think that solicitors should be aware of what is being said about them, that we give further publicity to a complaint in the correspondence columns of the *Estates Gazette* of 10th November that failure to answer correspondence is current on an alarming scale, and that the professions who should set an example can be termed the chief culprits. The writer of the letter continued: "We recently received a letter from a solicitor requesting details of four-five bedroomed properties in this area, and twenty-six sets of particulars were forwarded, together with a covering letter, the cost of the postage being sixpence. We received neither reply nor acknowledgment and wrote to the firm asking if any of the properties were of interest to their client. For the second time we received no reply." Estate agents have some cause for complaint that the general public solicit their assistance and fail to acknowledge it when received, so that they cannot check the extent

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to which their heavy postage expenses are justified. Like the writer of the letter, we believe that solicitors, not least in their dealings with members of other professions, should set an example of courtesy and not follow the general example of lack of it. But we also believe that lack of courtesy on the part of solicitors is the exception rather than the rule.

Overpayment of Land Registry Fees

SINCE the Land Registration Fee Order, 1956 (S.I. 1956 No. 1060), was introduced on 1st August, 1956, there have been many instances where a *half-fee has been paid in error* for the registration of charges lodged with applications for first registration. It is emphasised that under the 1956 Fee Order it is only in respect of charges accompanying *transfers* for value of registered land that a fee at the half-rate is payable. In the case of charges lodged with applications for first registration the position continues that no fee is payable in respect of those charges. A Land Registry notice drawing attention to the position points out that overpayment or underpayment of fees involves the Registry and solicitors alike in much fruitless labour. The Chief Land Registrar would be grateful, therefore, for the co-operation of the profession in ensuring that the correct fees are paid on all occasions.

Photographs of Birth Registers

WHERE it is necessary to prove the original entry in a Register of Births, and a petitioner cannot without undue expense or inconvenience travel to inspect the register, states a circular issued from the Principal Probate Registry, the Registrars of the Divorce Registry will give favourable consideration to an application under the Matrimonial Causes Rules, r. 25 (1), proviso (*c*), for leave to prove the entry by production of a photograph certified by the Superintendent Registrar or Registrar of Births and Deaths.

Coroners: New Rules

THE Coroners Rules, 1956 (S.I. 1956 No. 1691), and the Coroners (Indictable Offences) Rules, 1956 (S.I. 1956 No. 1692), come into operation on 1st December, 1956. The first-mentioned rules became necessary on the passing of the Road Traffic Act, 1956, which made a new motoring offence, viz.: the driving which causes the death of another person of a motor vehicle on a road recklessly, or at a speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case. This offence is punishable on indictment with imprisonment for not exceeding five years and is not triable at quarter sessions. Section 8 specifies that where the trial jury are not satisfied that manslaughter is made out but that negligent driving has been proved they can find a special verdict to this effect. On this being brought to the notice of the coroner concerned he shall adjourn his inquest under s. 20 of the Coroners (Amendment) Act, 1926. This does not entitle the new offence to be charged at a coroner's inquisition. The Indictable Offences Rules are purely procedural and are of no interest to those other than coroners and the persons concerned in the conduct of inquests. These Rules revoke the Indictable Offences (Coroners) Rules, 1927.

Rent Control Statistics

THE statistical tables of dwelling-house accommodation in Britain published as a White Paper on 16th November (Rent Control: Statistical Information, Cmnd. 17, 4d.), provides formidable means of both defence and attack in the forthcoming battle of the Rent Bill. In London the estimate of owner-occupied houses below Rent Act limits at present is about 800,000; elsewhere it is about 3,600,000. Premises let at controlled rents in London also number about 800,000 and there are 4,200,000 of these elsewhere. About 1,900,000 houses below Rent Act limits are privately owned in London, and 8,500,000 are privately owned elsewhere. Only about *50,000 houses above Rent Act limits* are privately owned in London and there are the same number of these in the provinces. There are about 350,000 publicly-owned dwellings in London, and 2,650,000 of these elsewhere. If the Rent Bill becomes law 190,000 houses will be decontrolled in London and 560,000 will be decontrolled elsewhere, while 610,000 will remain controlled in London, and 3,640,000 will remain controlled elsewhere. The most interesting of the tables is that showing the maximum increases of rents to be expected. The overwhelming majority may expect rent increases up to 7s. 6d., a minority may expect increases up to 10s., and relatively few will have to meet increases of over 10s.

Building Society Advances

THE latest quarterly figures from the Building Societies Association show that as a probable result of the recent rise in interest rates from 2½ to 3½ per cent., tax paid, the net inflow of funds rose from £13,900,000 in the second quarter of 1956 to £23,800,000 in the third quarter. Advances, however, dropped from £77,300,000 in the second quarter to £69,700,000 in the third quarter. This is the lowest quarterly total since the first quarter of 1954. Whether the present low figure will soon be raised largely depends on whether the inflow of funds can be kept up in face of the keen competition from other forms of saving.

The British Council

IT is pleasing to see, in the Annual Report for 1955–56 of the British Council, that there is a law committee advising the Council. On 1st July, 1956, its members were The Rt. Hon. LORD EVERSHED, D.C.L. (Master of the Rolls), chairman, Sir DINGWALL BATESON, C.B.E., M.C., Sir HAROLD DUNCAN, K.C.M.G., Q.C., Dr. A. L. GOODHART, K.B.E., Q.C., F.B.A., C. P. HARVEY, Q.C., T. G. LUND, C.B.E., The Hon. Mr. Justice MCNAIR, Professor G. A. MONTGOMERY, Q.C., J. B. G. PAYEN-PAYNE and F. R. COLLINS (Secretary). It is not so pleasing to try to find from the report what, if anything, the Council has done to publicise among the nations of the world the contribution of the English common law to the civilisation of the world. If over half the literate population of the world are using or studying English and about half the world output of literature on scientific research has been published in English, as the report states, it looks as though the Council is spending its time largely in preaching to the converted. It should be one of the main functions of organisations such as the British Council to bring home to distant nations that such part of the world as enjoys freedom owes it to the English common law. The almost complete silence of the report on this subject is alarming.

ATTEMPT TO COMMIT A SEXUAL OFFENCE

THE Sexual Offences Act, 1956, which comes into force on 1st January, 1957, is an Act to consolidate (with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949), the statute law of England and Wales relating to sexual crime, to the abduction, procuration and prostitution of women and to kindred offences. It is interesting legislation, and the manner of drafting appears to be in a new style when compared with that hitherto adopted by parliamentary draftsmen. This article is concerned with one aspect of the criminal law regarding sexual offences, namely, attempts.

Attempts generally

It will be helpful to consider first the main outline of the law regarding attempts to commit crime of any kind. Space will not permit a wide survey, but generally speaking it can be stated that any attempt to commit a felony or misdemeanour is a misdemeanour at common law whether the crime attempted is statutory or one at common law. Mere intention to commit an offence does not constitute an attempt; some act (*actus reus*) by the accused must be proved directly connected with the offence. Lord Mansfield in *R.* v. *Scofield* (1784), Cald. 397, said: "So long as an act rests in bare intention it is not punishable, but immediately that an act is done the law judges not only of the act done but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent though the act itself would otherwise have been innocent, the intent being criminal the act becomes criminal and punishable." In *R.* v. *Taylor* (1859), 1 F. & F. 511, Pollock, C.B., said: "It is clear that every act committed by a person with a view of committing the felonies [those mentioned in a statute] is not within it, as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." In *R.* v. *Roberts* (1855), Dears. 539, Jervis, C.J., said: "It is difficult and perhaps impossible to define what is and what is not such an act done in furtherance of a criminal intent, as will constitute an offence . . . Many acts, coupled with the intent, would not be sufficient. For instance, if a man intends to commit a murder and is seen to walk towards the place of the contemplated scene, that would not be enough."

The principle to be applied by the court in deciding the question was stated by Parke, B., in *R.* v. *Eagleton* (1855), Dears. 515, and is still quoted with approval by the Court of Criminal Appeal as the *locus classicus* of what amounts to an attempt. His lordship said: "Mere intention to commit a misdemeanour is not criminal. Some act is required and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." That statement was approved and followed in *R.* v. *Robinson* (1915), 31 T.L.R. 313; 59 SOL. J. 366, where Lord Reading, C.J., said that the difficulty that arises and which has led to a considerable difference of language in later cases is in applying this principle to the particular facts of the case. In *R.* v. *Cope* (1921), 38 T.L.R. 243; 66 SOL. J. 406, which concerned a charge of attempting to procure the commission of an act of gross indecency, Lord Trevethin, C.J., after pointing out that the letters in question which were said to be the acts constituting the attempt to procure did not contain an undisguised invitation to commit the offence, laid it down that, in order to see whether the letters did contain such terms that the addressee would see in them an invitation to commit an act of gross indecency with the appellant, the surrounding circumstances might and should be examined.

The courts have repeatedly pointed out that whether or not the acts are sufficient to constitute the offence is a question of law for the judge and when he has decided that they are it then becomes a question of fact for the jury whether there was an attempt or not. In magistrates' courts, of course, the justices perform both functions, but it would seem to be proper for them to approach the question first as to the law and then as to the facts as in the higher courts.

Form of charge

At present, before the coming into force of the Sexual Offences Act, some attempts to commit a sexual offence are included in the section of the statute dealing with the substantial offence, principally in the Criminal Law Amendment Act, 1885, e.g., s. 3 (attempting to procure by threats or intimidation any woman or girl to have unlawful carnal connection); s. 4 (attempting to have unlawful carnal knowledge of a girl under 13); s. 11 (attempting to procure an act of gross indecency). Another example is attempted incest in s. 1 of the Punishment of Incest Act, 1908. These statutes, and any others containing mention of attempts, have all been repealed by the Act under present consideration. Nowhere in the sections of this Act dealing with the full offence is there any mention of the attempt. Attempts are included in that part dealing with powers and procedure only in s. 37 and in Sched. II, which is comprised of a table of offences, with mode of prosecution, punishments, etc.

By s. 9 of the Criminal Procedure Act, 1851, if on the trial of any person charged with any felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the offence charged but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged but is guilty of an attempt to commit the same. This, obviously, obviates any necessity of alleging an attempt where the complete offence is in fact alleged, but in those cases where an attempt only is preferred in the first instance it has been the practice hitherto to quote the section in which it has appeared. In summary cases magistrates' courts have no power similar to that contained in s. 9, *supra*, and it is always necessary to allege an attempt where this course is called for and, here again, the section of the statute is invariably quoted in those proceedings. After 1st January it will be proper, where it is necessary to do so, to quote the attempt as being contrary to the common law. In passing, it is interesting to note that the Sexual Offences Act refers to felonies and offences and does not describe those offences less than felony as being misdemeanours.

Some illustrative cases

As it has been laid down, the act necessary to constitute the attempt must be an overt act and directly connected with the offence and not only remotely connected. There are some other cases from which guidance can be obtained, the latest one appearing to be *R.* v. *Miskell* [1954] 1 W.L.R. 438; 98 SOL. J. 148 (a decision of the Courts-Martial Appeal Court but one which must naturally be followed in the civil courts), where the defendant, a soldier serving in Germany, asked the way of a boy in the street and then treated him to beer and ice-cream at a café. They went together to a park and while sitting down together the defendant said and did indecent things which manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. He arranged to meet the boy on the next night and at that meeting he suggested that they should go for a walk. He was arrested. He was convicted and appealed. It was submitted on his behalf that the evidence only amounted at the most to evidence of acts of preparation for procuring the commission of the offence and did not amount to evidence of an attempt to procure the commission. Hilbery, J., said: "Not all acts which are steps towards the commission of a crime can be regarded as attempts. Some may be too far removed from the commission of the crime to be regarded as attempts to commit the crime; but just where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it is often a difficult and nice question." His lordship reviewed the evidence and said it was important to bear in mind that the question was not whether the invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question was whether the acts were acts to procure the commission of that offence. It was not a question whether there was an act of procuring but whether there was an act which was an attempt to procure. He continued: "The law does not, however, punish a man for a guilty intention but for the overt act done as part of the carrying out of that intention. Now, the intention of the appellant here was undoubtedly to procure an act of gross indecency with the boy. The invitation and the meeting were overt acts." The appeal was dismissed.

In *R.* v. *Woods* (1930), 46 T.L.R. 401, the appellant was convicted of an attempt to procure the commission of an act of gross indecency with a male person. He wrote letters, purporting to come from a woman, to a man, inviting him to have immoral relations with the writer. The conviction was quashed following *R.* v. *Robinson*, *supra*, as being only remotely connected with the commission of the offence.

Where the offence charged is one of attempting to commit an act of gross indecency there is no reason why one person should not be indicted and convicted alone: *R.* v. *Pearce* [1951] 1 T.L.R. 412; 95 SOL. J. 239.

In *R.* v. *Landow* (1913), 29 T.L.R. 375, the appellant was convicted of attempting to procure his wife to leave her usual place of abode in the United Kingdom with intent that she should become an inmate of a brothel abroad. The conviction was quashed on the ground that the judge at the court of trial had not properly directed the jury on the difference between an attempt and intention.

In *R.* v. *Burrows* [1952] 1 T.L.R. 51; 96 SOL. J. 122, the appellant was convicted of indecent assault on a boy whose evidence was that the appellant exposed himself and asked the boy to masturbate him and also attempted to touch the boy's private parts. It was held by the Court of Criminal Appeal that the former act could not amount to an indecent assault, because there had been no threat or hostile act by the appellant towards the boy and consequently no assault. *Per* Lord Goddard, C.J.: "The appellant ought to have been charged with attempting to procure an act of gross indecency with the boy. If he had been so charged he would, no doubt, have been very properly convicted . . . The court feels obliged to quash this conviction but the case may be of some use if prosecuting authorities are made aware that in a matter of this description, where the prisoner and a boy are concerned, the prisoner should be charged with procuring or attempting to procure (as the case may be) an act of gross indecency and not with indecent assault."

By s. 19 of the Magistrates' Courts Act, 1952, and Sched. I thereto, an attempt to commit an offence mentioned in the Schedule, e.g., indecent assault on a person under the age of 16, may be dealt with summarily with the consent of the accused.

J. V. R.

THE SOLICITORS ACTS, 1932 TO 1941

DERRICK STEPHEN DAVIES, of Attorney General's Chambers, Nairobi, solicitor, having, in accordance with the provisions of the Solicitors Acts, 1932 to 1941, made application to the Disciplinary Committee constituted under the Act that his name might be removed from the Roll of Solicitors at his own instance on the ground that he desires in due course to be called to the Bar, an order was, on 1st November, 1956, made by the committee that the application of the said Derrick Stephen Davies be acceded to and that his name be removed accordingly from the Roll of Solicitors of the Supreme Court.

GRAY'S INN

Her Majesty The Queen honoured Gray's Inn with her presence in Hall on 13th November, accompanied by the Duke and Duchess of Gloucester, when the treasurer, Sir Leonard Stone, and the Masters of the Bench presented to Her Majesty and Their Royal Highnesses an Elizabethan Show, Masque and Revel in the costumes of 1594. The masque was last played before Queen Elizabeth I in that year by Gray's Inn. The following Masters of the Bench and their ladies were present: The Right Hon. the Lord Chancellor and Lady Kilmuir; The Hon. Mr. Justice Hilbery and Lady Hilbery; Mr. N. L. C. Macaskie, Q.C., and Mrs. Macaskie; Sir Harold Derbyshire and his daughter, Miss Derbyshire; Mr. R. Warden Lee and Mrs. Lee; The Hon. Mr. Justice Wallington and Lady Wallington; Lord McNair and Lady McNair; Sir Arthur Comyns Carr, Q.C., and his daughter-in-law, Mrs. Comyns Carr; The Hon. Mr. Justice McNair and his sister, Dr. Dorothy McNair; The Hon. Mr. Justice Sellers and Lady Sellers; The Hon. Mr. Justice Barnard; The Right Hon. Sir Hartley Shawcross, Q.C., and Lady Shawcross; Mr. Sydney Pocock and Mrs. Pocock; Sir John Forster and Lady Forster; Mr. Henry Salt, Q.C., and Mrs. Salt; Mr. Durley Grazebrook, Q.C., and Mrs. Grazebrook; Mr. Michael Rowe, Q.C., and Mrs. Rowe; The Right Hon. the Lord MacDermott and Lady MacDermott; Mr. Percy Lamb, Q.C., and Mrs. Lamb; The Hon. Mr. Justice Devlin and Lady Devlin; Mr. J. W. Brunyate and Mrs. Brunyate; Sir Denis Gerrard and Lady Gerrard; Mr. H. Edmund Davies, Q.C., and Mrs. Davies; The Right Hon. Sir Lionel Leach and his niece, Miss Muehl; Mr. A. P. Marshall, Q.C., and Mrs. Marshall; Sir Edward Maufe, R.A., and Lady Maufe; Mr. R. C. Vaughan, Q.C., and Mrs. Vaughan; Mr. G. W. Tookey, Q.C., and Mrs. Tookey; Mr. Dingle Foot, Q.C., and Mrs. Foot; The Right Hon. L. M. D. de Silva, Q.C., and Mrs. de Silva; Mr. J. Ramsay Willis, Q.C.; Mr. David Karmel, Q.C., and Mrs. Karmel, and Sir Hersch Lauterpacht, Q.C., and Lady Lauterpacht.

TAX AND DAMAGES—III

ADVANCED PROBLEMS

As we have seen, the damages to be awarded for loss of income must be calculated on the basis of the net amount of that income after allowing for the tax that would have been payable thereon whether the income was derived from an employment charged under Sched. E and taxed by deduction under the Pay As You Earn system, or from a trade or profession assessable under Case I or II of Sched. D. In practice, however, the calculation of the tax deduction where the lost income arises from a trade or profession gives rise to problems of its own. The fact that trade profits are always liable to fluctuation, however industriously the trader pursues his livelihood, will, of course, add to the court's difficulties in arriving at a gross estimate. It also means that there is no ready-made standard to which the plaintiff's advisers can refer in order to ascertain both the probable amount of the earnings and also the tax appropriate thereto.

Where an accountant has been regularly employed in the past to audit the trader's books and to make up the accounts for taxation purposes he may well be able to supply evidence as to the trend of profits, and may also testify as to the anticipated availability of any special taxation allowances, e.g., those for capital expenditure, to which his client might have become entitled in the years covered by the estimate of loss.

Some help in finding a suitable approach to cases where the lost income is derived from a source assessable to tax on trading accounts is to be gathered from a formula propounded by Lord Morton in the *Rought* case. That case, it will be remembered, dealt with the compensation to be awarded under the relevant statutory provisions to a company for its loss of profits between the time when its premises had been compulsorily acquired, and the time when it was able to occupy new premises. Since the injurious affection of the claimant's trade had ceased before the compensation came to be assessed, it is perhaps comparable with a case of special damage. Lord Morton suggested, while disclaiming any attempt to lay down a general rule, a procedure whereby a claimant might in these circumstances quantify his net loss. The claimants could submit to the Lands Tribunal (to whom their lordships remitted the case for the assessment of compensation on the true principle) (*a*) a statement of the tax liability which they actually incurred in respect of their trading during the year in question, and (*b*) an estimate of the tax liability which they would have incurred in the same year if they had in fact made the additional profit for the loss of which the compensation was payable. The figures would be open to criticism by the compensating authority. When the tribunal had decided what were the right figures under (*a*) and (*b*), the amount by which the claimant's gross loss was to be reduced would be the difference between (*a*) and (*b*).

Private income

Lord Goddard expressly reserves from his general direction to a jury (quoted in our first article, p. 810, *ante*) cases in which sur-tax introduces a complication. The rate of sur-tax may, as he points out, be affected by private income, by which expression his lordship obviously means unearned or investment income, or putting it perhaps slightly more widely, income apart from that the deprivation of which is the occasion for the award. The nature of this private income, too, will be relevant. " If it is a life annuity under a will or settlement it may well be expected to continue. If it is disposable investments which might be sold at any time or transferred to a child, less, perhaps little, regard should be had to it " ([1956] A.C., at p. 209).

In *Beach* v. *Reed Corrugated Cases, Ltd.*, Pilcher, J., had to deal with a concrete instance of the interaction of private income and the loss in respect of which he was awarding damages. The plaintiff in that case had a large private fortune and an income of over £20,000 derived from private investments. He had also a comparatively small earned income from a source independent of the defendants who had repudiated his service agreement with them. Out of this income he had engaged himself to pay a gross yearly sum of about £4,900 in such a way as to be deductible for sur-tax. Formerly his covenanted payments had been a good deal larger, and the evidence was that the plaintiff intended again to increase substantially the annual sums which he was liable to pay away in this manner. He had also the intention in the near future of making substantial capital provision for certain of his relatives. On all these matters his lordship had the evidence, which he accepted, of the plaintiff.

In addition the parties had put before the judge alternative calculations, the bare results of which illustrate in the most striking way the tremendous effect the existence of private income is capable of exercising in these matters. The gross amount which the plaintiff originally claimed was £48,000. On the one hand, if the only tax to be taken into account were to be tax on this gross figure at the " effective " rate but ignoring any additional tax liability arising from the unearned income of the plaintiff and assuming that the covenanted sums would be covered by such unearned income, the sum to be awarded would be reduced from £48,000 to £22,000. On the other hand, the defendants' schedule assumed that the plaintiff's unearned income would remain as it was, no capital dispositions being made, but that the covenanted sums would continue to decrease as they had done in recent years, and it accordingly took into account the incidence of income tax and sur-tax on the whole income. A reduction of the gross damages of £48,000 made on this basis would have brought the figure to be awarded down to £4,650.

Exactly how much regard the learned judge paid to each of the contingencies pressed upon his attention in argument he tantalisingly though understandably does not say. He first of all disallowed £5,000 of the gross figure, leaving the amount upon which his balancing of the possibilities was to operate at £43,000. Some of the possible contingencies had nothing to do with taxation. The plaintiff might have died during the currency of the service agreement or have been forced to accept a lesser salary owing to ill-health. It was urged on behalf of the defendants that it was proper to take into account the disposability of investments only to the extent that they were *likely* to be disposed of, and that it would have been possible for the plaintiff to make his projected capital alienations without disturbing the bulk of his free investments. Pilcher, J., remarked in dealing with this submission that even so a large portion of the plaintiff's capital might be put by him into some non-income-

bearing investment with a prospect of capital appreciation or in the purchase of a substantial annuity. All these eventualities were reviewed in the course of the judgment, but in the end the learned judge returned to the recommendation of Lord Goddard that little regard should perhaps be paid to the incidence of tax in the case of such disposable investments.

The figure at which Pilcher, J., arrived as his net award of damages was £18,000.

Caveat

The effect of the decision in *West Suffolk County Council* v. *W. Rought, Ltd.*, is that statutory compensation, in so far as it is to be measured by loss of profit, ought to take account of the claimant's hypothetical tax liability in respect of the lost profit. At first sight this might appear to be but an affirmation of the principle of the Irish decision, *Comyn* v. *Attorney-General* [1950] I.R. 142, which was cited to their lordships in the *Gourley* case. Kingsmill Moore, J., had there made a deduction for tax in fixing compensation for a compulsory acquisition. It is well to notice, however, what may be an important difference. *Comyn's* was a case in which the court was concerned to arrive at a fair valuation of a capital asset, the Acquisition of Land (Assessment of Compensation) Act, 1919 (which brings into account considerations other than land values), having been held not to apply. Such in effect was Earl Jowitt's analysis of the problem before the Irish court (see *Gourley* [1956] A.C., at p. 202). Earl Jowitt expressed no final opinion on *Comyn's* case, but made this observation, which Lord Morton in his speech in *Rought* adopted: "In such a case I should have thought it questionable whether a reduction of the amount to be paid as compensation for that capital asset, based on the prospective liability of its owner, was in accordance with the true principle of valuation."

The distinction may need careful watching in practice. A final citation from Lord Morton clarifies its true basis. Conceding that the sum to be awarded for temporary disturbance formed part of the total consideration to be paid to the respondents on the acquisition of their property (which, we may remark, was the professed reason why the compensation was said not to be liable to tax), Lord Morton yet insists that "the estimation of that sum does not involve a valuation of a capital asset but a computation of a temporary loss of profits by a company which remained in business. The tribunal, rightly in my view, dealt with the 'value of the leasehold interest in the land taken' under a separate subhead." Perhaps we would not put it too broadly if we were to say that the calculation of value in *Comyn* v. *A.-G.* ought properly to have taken no account of any loss of profit.

All which merely serves to emphasise the scope and limitations of the *Gourley* principle. It applies where the damages or compensation recoverable legitimately includes a figure for loss of taxable income, the sum awarded not being itself attractive to tax. The plaintiff or claimant must show what income loss he has suffered and will in probability suffer, allowing by way of deduction a reasonable sum to represent the tax which he would otherwise have borne. This deduction is to be calculated at what we have called his effective rate, taking into account, so far as it is possible to ascertain it on the evidence, the incidence on that rate of the subject's other taxable income.

J. F. J.
J. L. M.

HE STAKED HIS LIFE

"It's a good little bus. I would stake my life on it. You will have no trouble with it," said the dealer to the buyer in *Andrews* v. *Hopkinson* [1956] 3 W.L.R. 732; *ante*, p. 768. But it was the buyer who staked his life, luckily not losing it, when he drove the vehicle after completing the transaction: due to a fault in the steering mechanism the car yawed across the road and collided with a lorry.

The claim in contract

We should not strictly call him the buyer, for the arrangement for acquisition of title was by a hire-purchase agreement made in the normal method nowadays through a finance company. Was there any contract at all between the dealer and his customer, and (whether there was or not) was there any other common-law duty between them such as would support an action in tort in respect of the injuries sustained by the customer?

The answer to both these questions is in the affirmative. So far as the title to the goods is concerend, the main contracts are (1) a contract of sale by the dealer to the finance company, and (2) a contract of hire-purchase between the customer and the finance company. But there is also a very important linking contract between the customer and the dealer. In essence its terms are: "In consideration of your agreeing to take the car on hire-purchase terms, I agree to sell it to a finance company who will let it to you on such hire-purchase terms." The mutuality behind this contract is that the customer gets the car he wants, and the dealer gets his profit on the sale to the finance company.

If, therefore, the dealer makes representations about the quality of the goods which prove to be untrue, the customer will have a contractual remedy. If the representations amount to a warranty he will have a remedy in damages for breach of warranty, a point established in *Brown* v. *Sheen & Richmond Car Sales, Ltd.* [1950] 1 All E.R. 1102.

Suppose, however, that no express words of warranty are uttered, can the customer claim the benefit of the implied warranties mentioned in s. 14 of the Sale of Goods Act, 1893? In *Drury* v. *Victor Buckland, Ltd.* [1941] 1 All E.R. 269, the Court of Appeal held against such a principle because they considered the transaction between the parties concerned was not one of sale. Whether this is still good law was doubted by McNair, J., in the instant case of *Andrews* v. *Hopkinson*, *supra*, who pointed out that *Drury's case* is earlier than the decision in *Brown* v. *Sheen & Richmond Car Sales, Ltd.*, wherein it was established that there is a contractual relationship between the dealer and his hire purchase customer. Whether it is one of sale or agreement to sell within the Sale of Goods Act is another matter; it seems that McNair, J., would have been prepared to say that it was had he not already had enough grounds to find for the plaintiff.

The claim in negligence

The injured customer in his claim against the dealer relied also on the tort of negligence. There he was also successful, for the learned judge held that, in view of the fact that the car was very old, any competent mechanic ought to have

appreciated that excessive wear in the steering mechanism was most likely. It could have been discovered easily by a mechanic and, as the defendant had no reason to expect that the plaintiff would examine the car or have it examined, there was negligence. This head of liability had also been established in the earlier case of *Herschtal* v. *Stewart and Ardern, Ltd.* [1940] 1 K.B. 155, where motor dealers supplied the plaintiff on hire-purchase terms with a car which they had repaired, and, owing to faulty workmanship, the rear wheel of the car came off. Tucker, J., applying *Donoghue* v. *Stevenson*, held that the test of liability depended on whether or not it could be reasonably anticipated that the car would be examined by the party taking it, or other third party, before being put on the road, and not on whether such an examination was possible.

Measure of damages

With these two, and possibly three, heads of liability established, there remained the question what losses were within the rule. The plaintiff had suffered damage to his car and personal injuries and it was, naturally enough, argued (though rather faintly) by the defendant that the claim in respect of personal injuries was too remote. It is of interest to note that in rejecting this argument McNair, J., regarded the whole loss as within the contractual rules of remoteness, which, it is submitted, are narrower in operation than the rules of remoteness in tort.

This decision, then, is useful in that it synthesises the earlier decisions on the contractual aspect (discussed at 99 Sol. J. 607) with the tortious aspect. But if a motor dealer, or for that matter any other trader, endeavours to protect himself by express clauses excluding or limiting his liability for defects in the goods sold he will find that all is not easy in this direction either, as discussed in earlier articles (see 99 Sol. J. 298, and 100 Sol. J. 610). Moreover, he must now contend with s. 7 of the Road Traffic Act, 1956.

L.W.M.

Company Law and Practice

PROVING A COMPANY'S INTENTION—II

In a recent article entitled " Proving a Company's Intention " (*ante*, p. 695) the question considered was how a limited company could best prepare itself to discharge the burden of proof imposed on a landlord by s. 30 (1) (*f*) of the Landlord and Tenant Act, 1954. Under this paragraph a landlord, to oppose successfully the grant of a new tenancy, has to prove that, on the termination of a current tenancy, he intends to demolish, etc., the premises comprised in the tenancy. The conclusion then reached was that the law was tending to regard strict formality as an essential ingredient in proving intention when a limited company was concerned.

Since that article was written the Court of Appeal has given judgment in the case of *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* [1956] 3 W.L.R. 804 ; *ante*, p. 816, where the circumstances were comparable with those of the cases discussed in the earlier article. In the *Bolton* case the point taken on behalf of the tenants was summarised by Denning, L.J., as follows (at p. 811) : " . . . [counsel for the tenants] says there must at least be a board meeting. In view of the recent decision of this court in *Austin Reed, Ltd.* v. *Royal Assurance Co., Ltd.* (unreported), he has to concede that the decision of the board need not formally be recorded in a minute, but he says that, even though not formally recorded, there must be a board meeting by which there is a collective decision, and it is not sufficient that individual directors should individually be of one mind."

In the *Bolton* case all that could be proved was that, in pursuance of a resolution of a meeting of the managing directors of a group of cement companies, the three directors of the landlord company (a member of the group), which owned land that it had been resolved to redevelop, caused notice to quit to be given to the tenants of the land, and gave instructions for plans to be prepared, and for work to be done, as part of the scheme of the development of the remainder of the land, which was in the company's possession, and contracts were entered into for the purpose. In doing this the directors of the landlord company frequently met informally, and their architect prepared plans, but the directors did not hold any meeting of the board, pass any resolution or record their decisions in any minute. The conduct of the company's business was normally left to the directors individually, and the board of directors met only about once a year. In reaching the conclusion that, on these facts, the county court judge was justified in reaching the conclusion that the company had the necessary intention, Denning, L.J., said (at p. 813) : " So here the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent, and the other relevant facts and circumstances of the case. Approaching the matter in that way, I think, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, it seems to me that the judge was entitled to infer that the intention of the company was to occupy the holding for their own purposes."

Evidence of intention

It is a pity that *Austin Reed, Ltd.* v. *Royal Assurance Co., Ltd.*, decided on 18th July, 1956, was not reported on the question of minutes in view of the observations of Danckwerts, J., in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* [1956] 1 W.L.R. 678 ; *ante*, p. 435, and as it would also seem from the report of *Fleet Electrics, Ltd.* v. *Jacey Investments, Ltd.* [1956] 1 W.L.R. 1027 ; *ante*, p. 586 (decided 4th July, 1956) that the point had, in fact, been taken in the county court, in that case. It may now be said that the effect of the cases to date is that it is not necessary, as a matter of law, for a company to demonstrate, by the production of minutes, that a particular intention was held.

However, intention is a question of fact and, although a judge should not now say, " There are no minutes, therefore there is no evidence of intention," he can say, " Having considered the evidence, including the fact that there are no minutes, the company has not satisfied me as to its intention."

The distinction is elementary to a lawyer, and can be appreciated by a layman, but what is not always so satisfactory is its application to the particular circumstances of any case by the courts. As must be inevitable where the human element is involved, one judge will attach more importance to the presence or absence of minutes than another and, indeed, the same judge may, quite legitimately, attach different degrees of importance in different cases. All this may be excellent in theory but it is not at all helpful in practice to the client, whose one concern is whether or not he is going to get possession of his property.

The force of minutes

The difficulty is that each question is one of fact. The facts in the *Fleet Electrics* case were reasonably strong in favour of the landlord company which, nevertheless, lost before the county court judge, even though it could produce one fairly comprehensive minute. Factors which were taken into account were that there was only this one minute in the landlord's books, and that the prospective tenants were unable to produce minutes to show that their board had formally considered the matter (see the judgment of Lord Evershed, M.R., at pp. 1031 and 1035).

It is no consolation to a business concern, which may have committed substantial sums of money to a development scheme, to be told that it may have been less than fortunate and might have won if the case had been presented differently, but, as all that was involved was a question of fact, the decision of the county court judge could not be altered. What the business man wants his solicitor to tell him is how he can establish his intention beyond doubt to even the most exacting judge.

In the *Betty's Cafés* case, Danckwerts, J., whilst recognising that a company may sometimes exercise its functions by means of an agent, held (at p. 689) that, as there was no such contention in that case, the " intention of the respondent company can be discovered only from the acts of the board of directors as recorded in the minutes of the company." In the light of the *Bolton* case, it would seem that the latter part of this observation may go too far. Minutes are a cogent means of ascertaining intention, but not the only means.

Authority of agents

Another question on the presence or absence of minutes is suggested by the possibility that a company may act by an agent or by one director alone out of a board of several directors. A possible pitfall is that in such circumstances the authority of the agent to act may be challenged, and difficulty may be experienced if there is no minute conferring his authority upon him. A recent analogous example of the circumstances in which such a technical point may arise is *L.C.C.* v. *Farren* [1956] 1 W.L.R. 1297 ; *ante*, p. 748.

In the *Betty's Cafés* case, a large part of the misfortune of the landlords could be attributed to their failure to place one individual in sole control of operations. Indeed, in that case exactly the reverse obtained, as the landlord company was at pains to repudiate the authority of both a managing director and its secretary (who was also a director) to act on its behalf in respect of the property in question.

Conclusion

The practical conclusion seems to be that, although as a matter of law a formal resolution of the board of directors, duly recorded in the minutes, is not an essential ingredient in proving a company's intention, in practice it is going to take matters a very long way.

It is not thought that the suggestions recommended in the previous article need modification. These were to take early steps to place a single individual, duly and comprehensively authorised, firmly in control of operations at the outset, to minute his appointment and authority, and for him formally to report progress, to be recorded in the minutes, from time to time. There seems no good reason why the decision in the *Bolton* case should be treated as a ground for regarding the precautions recommended as unnecessarily complex. On the contrary the very fact that the point was taken in the *Bolton* case is in itself a justification for the course recommended.

The single basic question must never be lost to view. The landlord is faced with the need to prove its intention. A limited company can only act through its officers and agents. If it is not able to point to a systematic record of the decisions that have been taken, then, by all means, let it try to establish its case otherwise: but its task will be easier, and the risk much less, if there is a record of formal evidence.

There will still be plenty of cases where the steps proposed have not been taken, and the landlord company has to run the gauntlet of trying to prove its intention by other means, which may well afford opportunities to a technically minded opponent. The hazards of being a landlord are quite numerous enough without adding to them by taking a chance on a fairly simple matter.

H. N. B.

SOCIETIES

Sir Edwin Herbert, President of The Law Society, was the principal guest at the annual dinner of the BRADFORD INCORPORATED LAW SOCIETY, held at the Midland Hotel, Bradford, on 13th November. Sir Edwin replied to the toast " The Legal Profession," proposed by Dr. J. K. Rennie, of Bradford. Mr. John Duncan, president of the Bradford Incorporated Law Society, proposed the toast " Our Guests," to which Mr. J. H. Shaw, a past-president of the British Wool Federation, responded. Among the guests was the Lord Mayor of Bradford, Alderman H. R. Walker.

At the annual dinner of the YORKSHIRE LAW SOCIETY, held at the Merchant Adventurers' Hall, York, on 8th November, Mr. N. B. Kay proposed the toast " The Bench and The Bar," to which Mr. Justice Pearce and Mr. W. A. Goss replied. The toast " The Yorkshire Law Society " was proposed by the Chief Constable of York, Mr. C. T. G. Carter, and Mr. G. H. Heninghem, president of the Society, responded. Among the guests were Mr. Justice Barry, the High Sheriff of Yorkshire, and the president of the Hull Law Society.

BENTHAM CLUB

On 6th November, a joint moot was held at University College, London, in the Gustave Tuck Theatre, between the Bentham Club, which is open to all graduates of the Law Faculty, and the University College, London, Law Society. The moot concerned a problem in the law of contract, and McNair, J., presided. Messrs. H. H. Harris and B. T. Dixon represented the club. Messrs. J. C. Marshall and E. Cohen appeared on behalf of the students. Graduates interested in joining the club are requested to communicate with the hon. secretary, the Bentham Club, c/o Faculty of Laws, University College, London, Gower Street, W.C.1.

SURVIVING JOINT TENANT—EXPRESS POWER TO CONVEY

THE controversy as to whether a surviving joint tenant can give a good title as beneficial owner without appointing a new trustee to convey jointly with him under the trust for sale still continues. It is unfortunate that there is no decision providing authority on which solicitors could act. The issues have been exhaustively discussed and it is not proposed to state them again or to attempt to add to the arguments. Nothing is more troublesome to the profession than a serious doubt on a problem which arises so frequently. In such circumstances it is reasonable to ask whether, in the absence of an authoritative solution, a method of avoiding the problem altogether can be devised. Whatever may be the impression of the "man in the street," it is true to say that one of the most important tasks of solicitors is to assess whether difficulties may arise and to arrange affairs so that they are avoided.

When the time arrives for a sale by the survivor it is too late to look at the problem in this way. On the other hand it is usual to add "joint tenancy clauses" to any conveyance to beneficial joint tenants, and these clauses have, no doubt, avoided many problems as to the powers of the joint tenants, for instance, to lease or to mortgage. It is not surprising to learn, therefore, that some solicitors have suggested the introduction of a further clause that would ensure that the survivor could give a good title.

Clause denying right to sever

The use of such a clause would not normally arise until a lengthy period had elapsed after the date of the conveyance. But this problem has already troubled us for many years and so it may be worth considering whether we can prevent it even in the distant future. Can we, then, draft an appropriate clause? If severance of the beneficial joint tenancy could be prevented in advance, then a purchaser from the survivor would know that the survivor was solely entitled both at law and in equity and so he would be satisfied. This line of thought does not seem to produce any effective result. A clause purporting to deny to the joint tenants the right to sever the beneficial interest would seem to be void as restricting a power which is inseparable from ownership. What is more, the proviso to the Law of Property Act, 1925, s. 36 (2), contains express provision that, *inter alia*, a notice in writing shall sever the tenancy in equity, and no agreement between the tenants could exclude its effect.

Clause conferring right to convey

Nevertheless, we understand that some solicitors have endeavoured to achieve the object by other means. Their argument is in the following terms. The equitable rights of all persons in the proceeds of sale, and in the profits until sale, are conferred by the trusts contained in the common-form conveyance to joint tenants. That conveyance could contain a clause to the effect that the survivor of the two joint tenants shall be able to convey the legal estate and to give a good receipt for the proceeds of sale. If that is done, it is argued that a person claiming to be beneficially interested could not have a good claim against a purchaser who accepted a title from the survivor. Let us assume that the beneficial joint tenancy had been severed and so turned into a tenancy in common but, nevertheless, after the death of one of the persons (who were joint tenants at law but had become tenants in common in equity), a conveyance was executed by the survivor as beneficial owner. Persons interested in the estate of the deceased might not receive their half-share and might then claim against the purchaser on the ground that their equitable rights were binding on him because he had not obtained a good receipt from two trustees selling under the trust for sale. Those who have devised the clause assert that it protects a purchaser from such a claim, although it does not prevent the persons entitled in equity from enforcing their rights against the surviving joint tenant.

At first sight this argument would appear sound. If persons claim beneficial interests under the conveyance how can they repudiate its terms? Yet we are obliged to express the opinion that this suggested clause also is not effective. The Law of Property Act, 1925, s. 27 (1), provides that a purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds. Subsection (2) of that section enacts that "*Notwithstanding anything to the contrary in a disposition* on trust for sale . . . the proceeds of sale . . . shall not be paid to . . . fewer than two persons as trustees of the disposition, except where the trustee is a trust corporation." This section is firm in its prohibition even where the disposition provides that one trustee (as the surviving joint tenant of the legal estate will be if severance has occurred) can give a good receipt, and so we are unable to agree that the object can be achieved.

Unfortunately our examination of these rather novel suggestions has led us to a conclusion which is not helpful. Yet we may not have appreciated all the relevant lines of thought and we would be interested to know if any of our readers have approached the problem on the basis of "prevention rather than cure" and, if so, whether they are satisfied that there is a safe solution.

S.

Mr. RICHARD W. T. CASS, senior assistant solicitor to Plymouth City Council, has been appointed deputy town clerk of Poole in succession to Mr. J. G. HILLIER, who has been appointed town clerk.

Mr. JOHN ROBERTSON DUNN CRICHTON, Q.C., has been appointed Judge of Appeal in the Isle of Man, in the room of Mr. Neville Jonas Laski, Q.C., who has resigned on appointment as Recorder of the Crown Court of Liverpool.

Mr. J. R. CUMMING-BRUCE has been appointed junior counsel to the Registrar of Restrictive Trading Agreements.

Mr. NEVILLE MAJOR GINNER FAULKS has been appointed Recorder of the Borough of Deal.

Mr. HORACE PLINSTON, clerk to Letchworth Urban Council, has been appointed honorary solicitor to the Society of Clerks of Urban District Councils in England and Wales.

At a luncheon held recently by the Institute of Public Cleansing to mark the retirement of Sir Parker Morris, LL.B., from the office of town clerk of the City of Westminster and his resignation as honorary solicitor to the institute, Sir Parker was presented by Mr. R. G. Totty, president of the institute, with a writing desk.

Landlord and Tenant Notebook

THE RENT BILL—II

DECONTROL

On the Bill becoming law, the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, are to cease to apply to any dwelling-house the rateable value of which, on 7th November, 1956, exceeds £40 in the Metropolitan Police District or City of London, or £30 elsewhere in England or Wales. And they are to cease to apply to any tenancy beginning at or after the commencement of the Act.

Decontrol has, of course, been done before, and the process now proposed seems less clumsy than the "is in possession or comes into possession" requirement of the Rent, etc., Restrictions Act, 1923. "This Act shall apply to a house or a part of a house *let* as" are the opening words of s. 12 (2) of the Increase of Rent, etc., Restrictions Act, 1920; but it took time before it was fully appreciated that there must be two things, a house and a tenancy, before control operated. The appreciation may be said to have been reflected in the prohibition of premiums provision in the Landlord and Tenant (Rent Control) Act, 1949, s. 2; by subs. (3) "this section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply."

But, while argument about the meaning of "possession" is avoided—s. 2 (3) of the above-mentioned 1923 Act insisted that "possession" be construed as meaning "actual possession" and led to half a dozen disputes about the effect of handing over a key, leaving it in a letter-box, etc.—there is a proviso to the cease-to-apply sub-clause: it is not to apply "where the person to whom the tenancy is granted was immediately before the granting [sic] tenant of the same dwelling-house under a controlled tenancy."

There are a number of exclusions. Statutory tenancies (and, presumably, sub-tenancies) brought into being (or maintained) by Pt. I of the Landlord and Tenant Act, 1954, which extended protection to under-tenants who would have been unprotected because the head leases reserved a rent less than two-thirds of the rateable value (*Knightsbridge Estates Trust, Ltd.* v. *Deeley* [1950] 2 K.B. 228 (C.A.)), are not to be affected. Nor are the statutory tenancies granted to ex-licensees as a result of invitations accepted by owners of requisitioned properties, under the Requisitioned Houses and Housing (Amendment) Act, 1955, to be affected, though in this case security is to cease on 31st March, 1965. And a landlord who obtains possession via the Housing Act, 1936, s. 65 (overcrowding—but should be very uncommon since the decision in *Zbytniewski* v. *Broughton* [1956] 3 W.L.R. 630; *ante*, p. 631) or the Housing Repairs and Rents Act, 1954, s. 11 (for the purpose of complying with an order either to carry out works or reduce number of occupants of unfit houses let in lodgings) will not find the premises decontrolled.

Future decontrol

Decontrol by stages has also been done, or attempted, before; and it may be that the disappointment which followed the passing of the Rent, etc., Restrictions (Amendment) Act, 1933—an Act designed to end Rent Acts, based on the expectation that enough houses would be built in the next five years to justify a return to a free market—accounts for a change of method. For when the time came, the Legislature was constrained to enact the Increase of Rent., etc., (Restrictions) Act, 1938, which, with its subdivision of two of the three classes created by the 1933 Act into sub-classes, further complicated a position which was already far from simple (the provision for registration alone was an undesirable feature).

The Bill proposes that a simple subsection shall authorise the Minister of Housing and Local Government to decontrol by reference to rateable value, orders to be made by statutory instrument effective if and when approved by both Houses. And, by way of innovation, he may make orders limited to particular areas. The idea is, presumably, that clearance and building are likely to proceed faster in one part of the country than another; the Minister will not be expected to experiment, making, say, Rutland his guinea-pig.

Transitional provisions

On decontrol taking effect, a tenant, contractual or statutory, is to have at least six months' grace (unless an order for possession is in force). To obtain possession, the landlord must serve a six months' notice (no form prescribed, as yet) which, in the case of a periodic contractual tenancy, will serve as a notice to quit. The rent will be the same as it was for the last rental period before decontrol of the dwelling-house, and any pending proceedings for variation of recoverable rent shall cease except in relation to costs. I am not quite sure what is intended here: rent recoverable is to remain recoverable until either increased or reduced under the earlier proposals and the right to apply for variation under the Landlord and Tenant (Rent Control) Act, 1949 (standard rent fixed by letting since 1st September, 1939), is preserved during that period; but the variation is entrusted to rent tribunals, which have no power to award costs.

Another important "transitional" provision—the term seems rather a misnomer in this case—is that which would transfer *statutory* tenancies now excluded from Pt. II of the Landlord and Tenant Act, 1954, by s. 43 (1) (*c*) of that Act to the protection of that Part, as "continued" tenancies. The subsection is the one which excludes four kinds of business tenancies from the operation of Pt. II, (*c*) being "a tenancy where the property comprised therein is let under a letting to which the restrictions on the obtaining of possession by the landlord imposed by the Rent, etc., Restrictions (Amendment) Act, 1933, s. 3, apply in relation to the tenant, or would apply but for the Increase of Rent, etc., (Restrictions) Act, 1920, s. 12 (7)" (the latter being those with a rent less than two-thirds of the rateable value): the ordinary case of "combined premises." The tenants are, therefore, to be transferred to "business tenancy" security of tenure.

Furnished tenancies

The present scope of the Furnished Houses (Rent Control) Act, 1946, is not limited by reference either to rent or to rateable value. It has been more than once judicially suggested that it was not intended to benefit the more affluent class of tenant—tenants, for example, who are "in a position to take flats of a class commanding rents of several hundred pounds a year—for the purpose of benefiting themselves at the expense of their landlords and in derogation of bargains

freely and deliberately made" (Jenkins, L.J., in *Mauray* v. *Durley Chine (Investments), Ltd.* [1953] 2 Q.B. 433 (C.A.)). But, provided that the Act has been applied to the district, it has the unintended effect.

The Rent Bill now proposes to exclude from its operation any contract relating to a dwelling of any class or description in any area if the rateable value of the dwelling on a given date is such that the Rent Acts (i.e., the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939) do not apply to dwelling-houses of that class or description in that area and of that rateable value on that date. Again, there is a period of grace: a landlord's notice to quit given before decontrol is not to take effect earlier than three months after that time, unless the local rent tribunal shortens the period; and any such notice given within the year following decontrol must be at least a three months' notice.

Some further work may be called for if this provision is to become law. For the Furnished Houses (Rent Control) Act, 1946, rather studiously avoids using the terms "dwelling" and "dwelling-house," speaking of "a right to occupy as a residence a house or part of a house" granted by one person to another, the two being somewhat unexpectedly designated "lessor" and "lessee." The definition clause in the Bill defines "dwelling" in reference only to "controlled tenancies," which does not include furnished tenancies. Then, the possibility of some lessee having a residence which is not separately assessed has been realised, but all possible consequences have not, I believe, been anticipated: it is to be provided that where a dwelling is or forms part of a hereditament for which no rateable value was shown in the valuation list on the given date, the first subsequent date on which there is a rateable value is to count. But suppose a "lessee" to occupy a small bed-sitting room in a large house rated at over £40? There appears, at present, to be no provision for apportionment.

R. B.

HERE AND THERE

THE QUEEN'S VISIT

A VISIT of Her Majesty the Queen to the legal quarter cannot leave indifferent anyone whose professional life is rooted there. The recent royal occasion at Gray's Inn was strictly for members only, and rightly, since, even so, no more than a fortunate minority of the members could be given places in the Hall. The entertainment was freely based on a masque originally enacted by the Society during the Christmas season in 1594–95. By all accounts the evening was an enormous success, chiefly because of the great beauty of the music in the sixteenth and seventeenth century manner, the gay and spirited dancing by the younger barristers and students, who shared the honours of the production with professionals, but, most of all, the peculiarly gracious and charming atmosphere which emanates from Her Majesty even when she is not speaking. The general information is that the fragment of the masque itself (for it was only a fragment), looked at as a piece of historical resuscitation, was too truncated to be intelligible, which was a pity, for students of the literature of the period know that the Masque of the Prince of Purpoole (Purpoole from the name of the manor house out of which Gray's Inn grew) has a tremendous amount of character and local colour. Something might have been done to give unity and perspective to the show by introducing the figure of Francis Bacon as a sort of compère, Bacon, who, in 1594, was a brilliant, ambitious, rising young man in his early thirties, not very long a Bencher of the Inn, a connoisseur in the masques which so shocked his Puritan mother. He must certainly have had a lot to do with the original production and possibly wrote some of the text. Instead (I am told) the Bacon interpolated in a "persons of quality" introduction was elderly and sententiously contemptuous of "mummery." However, that was only the start and the dancing in the splendid climax of the young people's revel sent everyone away feeling happy.

BREACH OF COPYRIGHT

THE amateur is well advised not to attempt to meet professionals on their own ground. On their own ground they are apt to be somewhat intolerant of interlopers, besides enjoying an overwhelming advantage. So too in the matter of what to wear and what not to wear and when, there are certain elementary principles of prudence to be observed. A casual stranger would do well not to wander into Buckingham Palace with a Garter blue ribbon slung carelessly over his shoulder. The ordinary sightseer had better not stroll into the House of Lords in a coronet, however appropriate it may seem to him. The sheep in wolf's clothing had better keep away from the wolf pack. And I once heard of an enthusiastic bird-watcher who, having disguised himself in something like the semblance of an ostrich, was mistaken by a male ostrich for a female of the species (or so it seemed) and escaped only with difficulty. So the man who recently ventured into an English court of justice transformed by a blond wig might, on a moment's reflection, have foreseen trouble ahead, however innocent his intention. The nightmare vision of row upon row of men in curly horsehair wigs pointing at him indignantly accusing fingers might well have been the subject of one of the old Bateman cartoons. It was not quite as intimidating as that, in fact, but it was intimidating enough when the man with the well groomed head of fair hair stepped from the dock to the witness-box at Middlesex Sessions. "Will you remove the wig you are wearing?" said his impeccably bewigged counsel and from underneath the wig removed appeared a head partially bald. Then another professional gentleman in a wig asked why he had worn it and the following dialogue took place: "I was told to wear it." "By whom?" The man mentioned a name. "Did you know what the object was?" "Yes. I heard the witnesses were coming to identify me." "So you hoped that, by your wearing the wig, they wouldn't be able to identify you?" "No, to put them thinking."

THINKING CAP

THIS rather happy phrase, conjuring up the picture of the wig as a sort of magic thinking-cap, might aptly be adapted as an additional justification of barristers' and judges' wigs as something which "puts them thinking." Psychologically that might not be so silly. The wig imparts a sense of dignity and confidence. It conceals cranial defects and sparseness of hair, thereby removing anxiety. It does for the face what a well chosen frame does for a picture. It keeps the head warm and cosy in the draughtiest court. It is at every point

an aid to thought. Perhaps the prisoner's wig was not of the right design or texture or colour to inspire the sort of thinking favourable to his case. His counsel (at whose behest he had removed it) assured the court that there had been no intention to deceive and that removal had always been intended, but he was duly identified as the driver of a car which had crashed into a lamp-post and the chairman, referring parenthetically to a " charade with a wig," sent him to prison for six months for driving while under the influence of drink. No, a non-forensic wig in court is a sort of breach of copyright. Any person there who wishes, for reasons of his own, to vary his personal appearance may adopt a totally new style of dress, change his complexion, shave his eyebrows, grow a beard, consult a plastic surgeon, but he must leave the wig alone. There's something unlucky about it.

RICHARD ROE

REVIEWS

Oyez Practice Notes, No. 5 : Apportionments for Executors and Trustees. Second Edition. By J. F. JOSLING, Solicitor of the Supreme Court, assisted by CHARLES CAPLIN, LL.B., Solicitor of the Supreme Court. 1956. London : The Solicitors' Law Stationery Society, Ltd. 3s. 6d. net.

No less than seven new cases have been decided in the field covered by this useful little book since the first edition appeared, and the effect of them all has been incorporated into the text, which has been brought up to date in every respect. While the greater portion of the book is devoted to the rules of equitable apportionment, statutory apportionments under the Apportionment Act, 1870, and the Settled Land Act, 1925, are also dealt with. The whole subject is one of considerable intricacy, with the basic rules overlaid with numerous exceptions and distinctions. The practitioner will, however, find in this book an able, clear and thorough guide through the labyrinth, while the examples appended in the last section, entitled " Practical Application of the Rules," are comprehensive and well thought out. Truly, this is a book whose value is vastly in excess of its length.

Trade Union Law. Fifth Edition. By HARRY SAMUELS, M.A., of the Middle Temple and Northern Circuit, Barrister-at-Law. 1956. London : Stevens & Sons, Ltd. 12s. 6d. net.

This is a concise yet comprehensive account of the law relating to trade unions. It deals in detail with the provisions of the Trade Union Acts and cites nearly all the leading cases decided under them. Its main fault is an unhappy arrangement of subject-matter. The definition of trade unions, the procedure for organising and registering them, their membership and the management of their affairs and property, are arbitrarily split into two parts at the beginning and end of the book, and are intersected by chapters on torts and crimes in which unions and their members may be involved.

It is stated (p. 12) that the right of a union member to sue his union for wrongful expulsion is dependent on his having a proprietary interest in the union's funds. This is supported by the *obiter dicta* of Esher, M.R., in *Rigby* v. *Connol* (1880), 14 Ch. D. 482, and Lord Buckmaster in *Amalgamated Society of Carpenters* v. *Braithwaite* [1922] 2 A.C. 440, but since the House of Lords in *Bonsor* v. *Musicians' Union* [1956] A.C. 104 ; 99 SOL. J. 814, have put the expelled member's rights on a wholly contractual basis, the requirement that he should also have a proprietary interest appears to be defunct. In this context, the book does not cite *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833 ; *ante*, p. 510, which decides that a union member wrongfully expelled may sue for breach of contract not only the union, but also the members of its governing body who misconduct the hearing which precedes their decision to expel him.

On p. 32 the common law of conspiracy in respect of stop-listing by manufacturers' and dealers' trade associations and black-listing by employees' unions is correctly set out. There is no mention, however, of s. 24 of the Restrictive Trade Practices Act, 1956, which makes illegal stop-listing by trade associations as a means of enforcing resale price maintenance agreements.

On p. 69 it is stated that in an action against certain union members sued to represent the whole membership, the named defendants cannot consent to judgment or compromise without leave of the court. This is so only if the action concerns property subject to a trust, or the construction of a written instrument (R.S.C., Ord. 16, r. 9A) and does not apply in any other case (*Re Alpha Co.* [1903] 1 Ch. 203).

The subject of collective bargaining is dealt with very sketchily and there is no detailed examination of the vitally important Industrial Disputes Order, 1951.

POINT IN PRACTICE

Costs—LIMITATION—NO BILL DELIVERED

Q. In June, 1946, *A* died having appointed *B*, her daughter, sole executrix of her will. Your subscriber's late partner was instructed to prove the will and administer the estate, and work was done between June, 1946, and August, 1947. Although there were various interests outstanding, all matters requiring immediate attention had been dealt with by August, 1947, and the file lay dormant. No report was made to *B*, nor did she ask for a bill. At no time during the course of the administration had your subscriber's firm handled any cash. Had it done so the bill would not have been overlooked. In April, 1950, a request was received from another solicitor for the probate, and this was accompanied by an authority signed by *B*. The probate was handed over. Nothing further transpired until September, 1955, when your subscriber discovered that no bill of costs had ever been delivered to *B*. A bill was thereupon sent with apologies and an explanation. *B* replied stating she understood that the account was settled and that in any event it was statute barred. She was informed that no bill had ever been delivered. Letters since written have failed to secure payment, although the estate was sworn at over £8,000 and *B* was the sole beneficiary. Your subscriber takes the view that there is no set time for delivering a bill in such a case and that time under the Statute of Limitations would not run until a bill is delivered. In your opinion, is the amount of the bill (under £40) recoverable ?

A. We think *Coburn* v. *Colledge* [1897] 1 Q.B. 702 is clear authority against the recoverability of the costs. That case decided that the limitation period runs from the time of completion of the work charged for in the bill, notwithstanding that no action for the costs could have been commenced until one month after delivery of a bill. The accrual of the cause of action is not necessarily the same, in point of time, as the earliest date upon which an action can be commenced.

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the " Points in Practice " Department, The Solicitors' Journal, 21 Red Lion Street, London, W.C.1.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

NOTES OF CASES

These Notes of Cases are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible, the appropriate page reference is given at the end of the note.

Court of Appeal

COMPULSORY PURCHASE: COMPENSATION: WAR DAMAGE: TOTAL LOSS: EFFECT OF DETERMINATION TO MAKE COST OF WORKS PAYMENT

Paddington Borough Council *v.* War Damage Commission

Associated London Properties, Ltd. *v.* Paddington Borough Council

Lord Evershed, M.R., Birkett and Romer, L.JJ.

29th October, 1956

Appeal from the Lands Tribunal by way of case stated. Two appeals heard together.

Section 53 of the Town and Country Planning Act, 1947, provides "(1) Where an interest in land the value of which is to be ascertained in accordance with the provisions of s. 51 of this Act is an interest in a hereditament or part of a hereditament which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under para. (*b*) of subs. (2) of s. 20 of that Act, be a payment of cost of works—(*a*) the value of the interest for the purposes of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat; and (*b*) the right to receive any value payment or share of a value payment which, under the War Damage Act, 1943, is payable in respect of the interest which is compulsorily acquired (including any interest payable thereon) shall, notwithstanding anything in that Act, vest in the person by whom the interest is so acquired." In the years 1940 and 1944 premises in London suffered war damage, which resulted in the buildings on the site becoming a total loss. On 4th May, 1945, the War Damage Commission sent to the claimants, Associated London Properties, Ltd., as lessees, and to the freeholders, a form Val. 4 which stated that the war damage did not involve a total loss and that the commission would make a payment of cost of works in respect of the property. It was admitted by the War Damage Commission that Val. 4 was incorrect in stating that the war damage did not involve total loss, but the commission, being satisfied that the premises were of such a nature as to fall within s. 20 (1) of the War Damage Act, 1943, had determined pursuant to the Treasury direction given under that section to make a cost of works payment. Subsequent to the receipt of Val. 4, the claimants entered into negotiations with the commission with regard to the erection of a new building on the site. The building which had been destroyed was of an elaborate character and the claimants prepared plans for the erection of a modern building in its place, the cost of the erection of which would be considerably less than the cost of replacing the original building, but the value of the premises would, when the modern building was completed, be greater than if the original building had been exactly reproduced. The commission agreed to the claimants' proposals. On 9th May, 1950, before work had been started on the new building, Paddington Borough Council, the local authority, served notice to treat on the claimants pursuant to a compulsory purchase order. The Lands Tribunal held that the commission had made a binding determination to make a payment of cost of works and that the compensation payable by the council should be assessed pursuant to the provisions of s. 53 of the Town and Country Planning Act, 1947, on the basis that the war damage had been made good before the notice to treat. The tribunal further held that "as if the damage had been made good" in s. 53 (1) (*a*) of the Act of 1947 meant as if the premises had been reinstated in their identical form before the war damage. The question for the decision of the Court of Appeal was whether the tribunal had come to a correct determination in law. *Cur. adv. vult.*

LORD EVERSHED, M.R., said that the proceedings before the court raised two short and distinct points of construction under s. 53 (1) of the Town and Country Planning Act, 1947. In form both questions sought a review of a decision of the Lands Tribunal upon a case stated for the Court of Appeal dated 5th July, 1956. The first question asked whether, in the events which had happened as they related to certain property in London (which was the subject of heavy war damage during the years 1940 to 1944), s. 53 (1) had any present application. The Lands Tribunal held that it had, and upon this question the Paddington Borough Council were appellants and the substantial respondents to this appeal were Associated London Properties, Ltd. The War Damage Commission were also respondents to this appeal and some arguments had been addressed to the court by counsel on their behalf. Upon the second question, which arose if the court were against the Paddington Council on the first, Associated London Properties were in the role of appellants. The question turned upon the meaning of four simple words in s. 53 (1) (*a*), namely "had been made good," which the Lands Tribunal, expressly following previous decisions of their own, interpreted as equivalent to "had been reinstated," that was, so as to put the building into the condition that it formerly had before the damage. Upon this matter the Paddington Council were in the position of respondents and the War Damage Commission had no concern with it. As to the first question, he (his lordship) thought that it was plain that the War Damage Act, 1943, and its provisions for making war damage payments would not in practice be workable unless, at some stage previously to the actual date when payment could be called for, an effective determination had been made by the War Damage Commission. That assumption underlay s. 53 (1), and on the facts of the present case, when regard was had to the Treasury direction and other matters, he (his lordship) could come to no other conclusion than that the payment which the War Damage Commission would properly have paid, that was to say, the payment which would have been the appropriate payment, had it not been for the compulsory acquisition, would have been a cost of works payment. For these reasons he would dismiss the appeal. The result was that it was necessary for the court to proceed to a decision on the second question. The argument of the Paddington Council in effect was that the words which had to be construed in s. 53 (1) (*a*) should be read as equivalent for present purposes to "as if the war damage had not occurred"; that was to say, by limiting "had been made good" to a form of reinstatement which again brought into being the exact building that had been there before the war damage occurred. It seemed to him (his lordship) that although the point in the present case was a different one, it would not be right for the Court of Appeal for another purpose and in another context to say that these words did mean the very thing which the House of Lords in *East End Dwellings Co., Ltd.* v. *Finsbury Borough Council* [1952] A.C. 109 said that they did not. He had, therefore, come to the conclusion that the words "had been made good" were equivalent to "if the work had been done for which, on the facts of the case as proved, the appropriate cost of works payment would have been made." Accordingly the second appeal would be allowed.

BIRKETT and ROMER, L.JJ., delivered concurring judgments. First appeal dismissed. Second appeal allowed.

APPEARANCES: *Harold B. Williams*, Q.C., and *G. D. Squibb*, Q.C., (*W. H. Bentley*, Town Clerk, Paddington); *Arthur Capewell*, Q.C., *J. Ramsay Willis*, Q.C., and *D. Widdicombe* (*Leslie Nathanson & Co.*); *Denys Buckley* and *B. Wilkinson* (*Treasury Solicitor*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [3 W.L.R. 911

BUILDING REGULATIONS: FENCING OF EXCAVATIONS: FALL OF WORKMAN INTO CONCEALED TANK

Knight *v.* Lambrick Contractors, Ltd.

Singleton, Jenkins and Parker, L.JJ. 1st November, 1956

Appeal from Pilcher, J.

The Building (Safety, Health and Welfare) Regulations, 1948, provide by reg. 77: "(Fencing of excavations, etc.)—Every accessible part of an excavation, pit or opening in the ground into

or down the side of which a person employed is liable to fall a vertical distance of more than 6 feet 6 inches shall be provided with a suitable barrier . . . Provided that the foregoing requirement shall not apply to any part of an excavation, pit or opening . . . while (and to the extent to which) it has not been practicable to erect such barrier since the formation of that part of the excavation, pit or opening." The defendants, building and demolition contractors, were engaged by a local authority to clear a housing site, part of which consisted of old stables and a conservatory. While the plaintiff and other workmen, employed by the defendants, were engaged in demolishing the remains of the conservatory, the ground on which the plaintiff was standing collapsed beneath him and he fell some 8 feet to the bottom of a water tank and sustained injury. The tank had been covered by two slate slabs, one of which had apparently been dislodged by the plaintiff working above it. On top of the slabs there had been a quantity of debris, and the existence of the tank was unknown to the defendants. The plaintiff sued the defendants for damages, alleging, *inter alia*, a breach of reg. 77. Pilcher, J., dismissed the action. The plaintiff appealed.

PARKER, L.J., delivering the first judgment, said that Pilcher, J., had held that the regulations applied only to excavations made by a contractor. It was argued for the plaintiff that as the words "pit or opening in the ground" appeared for the first time in reg. 77, the preceding regulations being concerned with "excavations," the mischief aimed at was to prevent people falling into holes, whether they were already there or made by the contractor, so that there had been a breach of the regulation. But such a hole might be anywhere on the land on which the workmen were engaged; some limitation must be put on the words "excavation, pit or opening in the ground," and in the context they must be limited to openings made by the contractor in the course of work on the site. Regulations 75 and 76 clearly dealt with excavations made by the contractor, and considerable assistance was to be got from the proviso to reg. 77. If there was any remaining doubt, reference could be made to the heading of the section of regulations, which was "Excavations." Even if such a construction was wrong, it was difficult to see how a tank covered by slate slabs and debris could be an "excavation, pit or opening in the ground."

JENKINS and SINGLETON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *P. Pain* (*W. H. Thompson*); *A. S. Orr* and *P. Medd* (*J. H. Milner & Son*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 906**

Chancery Division

WILL: ACCRUER CLAUSE: GIFTS TO TWO BENEFICIARIES WITH TRUSTS ENGRAFTED THEREON: EFFECT OF ACCRUER CLAUSE AFTER DEATHS OF BENEFICIARIES

In re Atkinson's Will Trust; Prescott *v.* Child

Upjohn, J. 2nd November, 1956

Adjourned summons.

A testator directed that his residuary estate should be held on trust for his two great-nieces *C* and *E* in equal shares and provided that the share expressed to be given to *C* should not vest absolutely in her but should be retained by the trustees on trust to pay the income to *C* for life and in trust for her children or remoter issue as she should appoint, and in default of appointment on trust for her children who should attain twenty-one in equal shares. Then the testator, by reference to those trusts, declared similar trusts in respect of the gift of the other moiety to *E*. The testator further directed as follows: "Provided always and I declare that in the event of the failure or determination of the trusts hereinbefore declared and contained concerning either of the shares in the said residuary moneys such share and the income thereof . . . shall go and accrue by way of addition to the other share in the said residuary moneys and such accruing share shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning the original share to which the same shall be added or as near thereto as circumstances will admit." Both *C* and *E* survived the testator and died without issue, *E* in 1927 and *C* in 1955. A summons was taken out to ascertain whether on *C's* death *E's* share passed to her personal representatives or to the residuary legatees under *C's* will.

UPJOHN, J., said that the original gift to *C* and *E* was absolute in terms; the trusts were engrafted on those absolute terms, so that it was a typical case where the principle in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, applied: it was not disputed that on *E's* death her share passed to *C* for life, and that on *C's* death her own share remained in her estate. It was contended for *C's* representatives that the accruer clause was appropriate to carry *E's* share to *C* for all purposes. For *E's* estate it was argued that the accruer clause operated only to engraft the trusts concerning the original share, and did not operate so as to make the gift to *C* absolute. There was no direct reported authority on the question. *In re Litt* [1946] Ch. 154 established that it was possible to have a gift of the *Lassence* v. *Tierney* type with an accruer clause, but that decision could have no direct application, and the present problem must be approached free from that authority. There had been an original absolute gift to *E*, with certain trusts engrafted on it; in so far as those trusts failed, the original gift remained, and after her life interest the only resultant trust was that the share was to accrue to the other share. The testator had not said that one share was to go over to the other for all purposes; he had directed in precise terms that the accruing share should "be held upon the trusts and subject to all the powers and provisions" applicable to the original share. Such trusts, powers and provisions did not, as a matter of construction, include the original gift which was in absolute terms, but only the trusts engrafted on that gift. The effect was that those trusts had come to an end on the death of *C* without issue, so that the original gift of *E's* share remained. Declaration accordingly.

APPEARANCES: *T. L. Dewhurst; O. Lodge; M. O'C. Stranders* (*Foyer, White & Prescott; Janson, Cobb, Pearson & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 900**

Queen's Bench Division

CONTRACT: LOCAL AUTHORITY: DEMOLITION CONTRACT MADE BY SURVEYOR NOT UNDER SEAL: WHETHER ENFORCEABLE

A. R. Wright & Son, Ltd. *v.* Romford Borough Council

Lord Goddard, C.J. 9th November, 1956

Preliminary points of law.

By an agreement in writing signed by the defendants' engineer and surveyor but not under seal, the plaintiffs were engaged to demolish certain buildings, the value of the contract to the plaintiffs being about £750 by way of profits. On the contract being repudiated by the defendants, the plaintiffs claimed damages for breach of contract. By their defence the defendants pleaded that as a corporation they were not bound by an agreement not under seal. By their reply, the plaintiffs relied on s. 266 of the Local Government Act, 1933, and s. 74 (2) of the Law of Property Act, 1925, and alleged that the contract was made in accordance with the defendants' standing orders and that the engineer had been appointed to sign it. The points raised were ordered to be disposed of before trial.

LORD GODDARD, C.J., said that from early times a general rule had existed that an unsealed contract was enforceable neither by nor against a corporation, but there were certain exceptions to the general rule. In *Church* v. *Imperial Gas Light and Coke Co.* (1838), 6 A. & E. 846, Lord Denman, C.J., had said that whenever strict application of the rule would cause very great inconvenience, or tend to defeat the object for which the corporation was created, the exception had prevailed; hence such exceptions as the retainer by parol of an inferior servant, or the doing of acts frequently recurring or too insignificant to be worth sealing. Admittedly the present case did not fall within those exceptions. Section 266 of the Act of 1933 provided that all contracts made by a local authority should be made in accordance with standing orders; that standing orders should provide for certain matters; that a person contracting with a local authority was not bound to inquire whether standing orders had been complied with, and that contracts, if otherwise valid, should be valid notwithstanding that standing orders had not been complied with. There was nothing in that which affected the established rule, and if Parliament had intended to make so drastic an alteration in the law as the plaintiffs suggested, it would have done so in clear terms. Standing orders dealt with the defendants' internal affairs, and the plaintiffs were not concerned with whether they

had been observed, but that was not to say that compliance with standing orders did away with the necessity of sealing a contract. Section 74 (2) of the Act of 1925 authorised the appointment of someone to sign on behalf of the corporation an agreement not under seal; but that could only refer to the execution of an agreement within the exceptions which would be binding in spite of the absence of a seal, such as the engagement of a menial servant, or the purchase of small quantities of goods required daily. The plaintiffs' contention failed. Judgment for the defendants.

APPEARANCES: *C. T. Salkeld-Green* (*W. G. R. Saunders, Son & de Wolfe*, for *H. K. Eversheed & Co.*, Leyton); *G. D. Squibb*, Q.C., and *W. J. Glover* (*Sharpe, Pritchard & Co.*, for *J. Twinn*, Romford).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[3 W.L.R. 896**

Probate, Divorce and Admiralty Division

HUSBAND AND WIFE: JUSTICES: MAINTENANCE ORDER: EFFECT OF FOREIGN DIVORCE

Wood *v.* Wood

Lord Merriman, P., and Collingwood, J. 19th October, 1956

Appeal from an order of the metropolitan magistrate sitting at the North London Magistrates' Court.

In February, 1950, a court of summary jurisdiction made an order for maintenance in favour of a wife on the ground of desertion. The husband later went to America in the company of another woman, and acquired a domicile of choice in the State of Nevada, where he was granted a decree of divorce in September, 1954, on the ground that he and the wife had not lived together for three years. The wife knew nothing at the time of the divorce action, notice of which was served by advertisement in a Las Vegas newspaper. There was no evidence as to the laws of Nevada regarding the rights of an innocent wife to maintenance or alimony. The husband visited this country, and applied for the discharge of the order on the ground that the marriage had been dissolved; but the magistrate, who found the wife guilty of no matrimonial offence, refused, deciding that to do so would be contrary to the principles of natural justice, and would allow the husband to benefit by his own wrong. On the contrary, he varied the order by increasing the amount in view of the husband's improved circumstances. The husband agreed to pay off arrears of £260 10s. at £40 a week.

COLLINGWOOD, J., reading the judgment of the court, said that although so far as known the wife had not been guilty of any matrimonial misconduct, and knew nothing about the proceedings at the time, the fact remained that her status as a wife had been put an end to by a court of competent jurisdiction on a ground recognised in that jurisdiction, and there was no reported case in which an order had been maintained in favour of a wife against whom a decree had subsequently been granted, whether by an English or a foreign court. It would appear, therefore, that the reasoning in *Bragg* v. *Bragg* [1925] P. 20, based on a convenient use of the concurrent jurisdiction in this country, led to the following conclusions: First, that in the case of an English divorce supervening upon a magistrate's order, the order should be discharged if the wife was the divorcee, except, possibly, (1) in the case of a decree to both parties, or (2) where the divorce court had indicated the propriety of a compassionate allowance for the wife. Secondly, in the case of a wife being divorced by a foreign court of competent jurisdiction, the order must be discharged if the wife had been found not to be entitled to maintenance in that foreign court (*Mezger* v. *Mezger* [1937] P. 19). Further, if it were evident that her rights in the foreign country differed from those in this country, the proper course was to discharge the order and leave the wife to have recourse to whatever rights she might have in the foreign country (*Kirk* v. *Kirk* (1947), 63 T.L.R. 422). In the opinion of the court the same result as in the last case should follow also where, as here, no evidence had been given that she was entitled to any rights at all in the foreign country. The court fully appreciated and shared the views of the magistrate about the apparent hardship to the wife if the order in her favour were discharged. It had been made on the ground of the husband's desertion, and there appeared to be no reason to suppose that the desertion had been terminated at the time of the foreign decree. But it was most important to avoid any suggestion that effect was not being given to the foreign decree because of the grounds on which it was based, or on the ground that the substituted service had been ineffectual or that it was being assumed, without any evidence of the foreign law, that the husband's adultery or his desertion would be fatal according to the foreign law to his obtaining a decree on the ground of a three years' separation. Appeal allowed. Leave to appeal.

APPEARANCES: *C. L. Hawser* and *M. Graham* (*Tringhams*); *David Henderson* (*J. Clifford Watts*).

[Reported by JOHN B. GARDNER, Esq., Barrister-at-Law] **[3 W.L.R. 887**

Court of Criminal Appeal

PRACTICE DIRECTION

INDICTMENT: DRAFTING AND INSPECTION

Lord Goddard, C.J., Hallett and McNair, JJ.

12th November, 1956

LORD GODDARD, C.J.: The Attorney-General has informed the court that some diversity of practice exists with regard to the settling of indictments and affording inspection of them before trial. It is desirable that the practice both at assizes and sessions should be uniform and also that an accused person should, when practicable, be informed before trial of any charges included in the indictment additional to or varying from those on which he has been committed. Accordingly, the court in collaboration with the Attorney-General has prepared a practice note, which should be followed by those whose duty it is to prepare indictments.

(1) The prosecution are entitled to require that the terms of an indictment should be settled by counsel. Clerks of assize and of the peace can require it to be settled by counsel when they think fit. The necessity and cost of employing counsel will be a matter for the taxing officer. (2) Where an indictment or draft indictment settled but not signed contains counts which differ materially from or are additional to the charges on which the accused was committed for trial, the clerk of assize or clerk of the peace shall, except where the indictment has been settled by counsel for the prosecution, notify the prosecution and the accused of the fact and, where the indictment has been settled by counsel for the prosecution, notify the accused of the fact as soon as may be. (3) On or after commission day at assizes or the day before the sessions open at the Central Criminal Court or at quarter sessions or earlier at the discretion of the clerk of assize or clerk of the peace, facilities shall be given to the prosecution and to the accused to inspect the indictment or the draft indictment if the indictment has not then been signed. If on those days the indictment is not drafted, such facilities shall be given as soon as possible.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1499**

Courts-Martial Appeal Court

COURT-MARTIAL: EXTENSION OF TIME FOR APPEAL

R. *v.* Lacey

Lord Goddard, C.J., Ormerod and Ashworth, JJ.

24th July, 1956

Application for leave to appeal against conviction.

The applicant, Albert James Lacey, a senior aircraftman serving in the Royal Air Force, was convicted before a court-martial at Lichfield of obtaining money by false pretences. He petitioned the Air Ministry to quash his conviction. The petition was rejected on the ground that it was two days outside the time limit laid down for the presentation of such a petition by the Courts-Martial (Appeals) Act, 1951, s. 3, and the Courts-Martial Appeal Rules, 1952, r. 6 (1) (*b*), as substituted by the Courts-Martial Appeal (Amendment) Rules, 1954, r. 2. The matter was brought before the court by the direction of Lord Goddard, C.J., in order that the court might have the opportunity of considering the question of the extension of the time limit.

LORD GODDARD, C.J., said that there was no provision either in the Act or the Rules for extending the time and there was a very good reason for that, because those matters should not be left indefinitely undecided. Whether or not it would be desirable

to have a rule prescribing a period subject to the right of the court to extend it was a matter of policy which might be considered by the appropriate authority. The court could only say that the applicant could not apply for leave to appeal because he did not comply with the conditions precedent which the Act laid down in presenting his petition within the prescribed time. The court came to this decision without any real reluctance in this matter, because it was obvious that there was no ground for interfering with this conviction. For those reasons, even if the court could have extended the time, it is quite clear they should not have given leave to appeal because there was no ground for it. Application dismissed.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1495

MILITARY LAW: CONVICTION BY COURT-MARTIAL FOR CARELESS DRIVING IN GERMANY: NO WARNING IN ACCORDANCE WITH ROAD TRAFFIC ACT, 1930

R. *v.* Jennings

Pilcher, Ormerod and Ashworth, JJ. 30th July, 1956

Appeal against conviction.

The appellant, while serving in the army in Germany, was court-martialled and charged under s. 41 (5) of the Army Act with driving without due care and attention contrary to s. 12 of the Road Traffic Act, 1930. He entered a plea in bar contending that the court-martial had no power to punish him, because the military authorities had failed to give him warning of the intended prosecution within fourteen days of the commission of the offence as required by s. 21 of the Road Traffic Act, 1930. He was convicted and fined £15, which was subsequently reduced by the confirming authority to £10. He appealed.

PILCHER, J., said that it was argued for the appellant that under s. 41 a court-martial could convict only of offences punishable by the law of England, and that the appellant's offence was not so punishable because of the failure to give the notice provided for by s. 21 of the Act of 1930. The Solicitor-General argued that the effect of s. 41 was to make a person guilty of a civil offence guilty of a military offence; s. 21 was merely procedural and quite inapplicable to a soldier serving abroad, and it was not an offence against the Road Traffic Act to drive carelessly in Germany. Section 41 (5) provided that if a soldier was convicted of an offence which when committed in England was punishable by the law of England, he should be liable to suffer punishment, whether the offence was committed in England or elsewhere. Careless driving was punishable by the law of England, and it was idle to say that no offence had been committed because one or other of the provisions of s. 21 had not been complied with, that section being purely procedural. The appeal would be dismissed. Appeal dismissed.

APPEARANCES: *Melford Stevenson*, Q.C., and *D. Lloyd* (*Lomer and Wheater*); *Sir H. Hylton-Foster*, Q.C., S.-G., and *E. Garth Moore* (*Director of Army Legal Services*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 1497

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

Nurses Bill [H.L.] [13th November.

To consolidate certain enactments relating to nurses and assistant nurses for the sick.

Nurses Agencies Bill [H.L.] [13th November.

To consolidate certain enactments relating to agencies for the supply of nurses.

Patents Bill [H.L.] [14th November.

To provide for extending time limits for certain purposes relating to applications for patents; to validate extensions of time under s. 6 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, in connection with such applications in so far as any such extensions may have been invalid; and for purposes connected with the matters aforesaid.

Shops Bill [H.L.] [14th November.

To make, in lieu of the provisions in that behalf of the Shops Act, 1950, fresh provision with respect to times at which shops must close on week-days, the times at which retail trade or business may, on week-days, be carried on otherwise than in shops, Sunday trading and the conditions of employment of shop assistants and other persons employed in connection with retail trade or business and of young persons employed in certain occupations in connection with wholesale trade; to amend the provisions of that Act relating to the enforcement thereof; and for purposes connected with the matters aforesaid.

Read Second Time :—

Clyde Navigation Order Confirmation Bill [H.C.] [13th November.

Oban Burgh Order Confirmation Bill [H.C.] [13th November.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Second Time :—

Agriculture (Silo Subsidies) Bill [H.C.] [16th November.

Expiring Laws Continuance Bill [H.C.] [14th November.

Homicide Bill [H.C.] [15th November.

Read Third Time :—

Police, Fire and Probation Officers Remuneration Bill [H.C.] [16th November.

B. QUESTIONS

LEGAL ADVICE SCHEME

The SOLICITOR-GENERAL said that he agreed that it was certainly desirable that a legal advice scheme should be introduced when possible. He repeated the statement made by the Lord Chancellor on 3rd May last: "The Law Society, who have been most helpful in regard to this scheme, are considering whether they cannot find a better and cheaper method than they thought of at first." [12th November.

IDENTIFICATION PARADES

Asked whether he was aware that many barristers at the criminal bar thought that there were many cases in which the procedure in connection with identification parades had caused injustice, Mr. DEEDES said that there was no ground for this suggestion. The existing instructions issued by the Commissioner of Police provided all proper safeguards. [15th November.

STATE PENSIONS (FORFEITURE)

Mr. H. BROOKE said that a serving civil servant who was convicted and sentenced in criminal proceedings might be taken from his post as a disciplinary measure, when he would automatically forfeit any pension which he would otherwise earn by his service.

A member of the armed forces in similar circumstances might be discharged or dismissed; if he had had long service the military authorities might allow a modified pension. Under the Forfeiture Act, 1870, a pension drawn from public funds ceased to be payable to a pensioner who was convicted of treason or felony, for which he was sentenced to death, preventive detention, corrective training or imprisonment for more than twelve months. The Criminal Justice Act, 1948, enabled the pension to be restored in whole or part.

In cases which fell outside the Forfeiture Act, a pension might be reduced or cancelled. Such action was mainly taken in grave cases, as, for example, embezzlement of public moneys. [15th November.

CRIMINAL JUSTICE ACT, 1948, s. 23

The HOME SECRETARY said that he had caused a circular letter to be sent to chief constables drawing their attention to *R.* v. *Evans* in the Court of Criminal Appeal and to the strict requirements of the Criminal Justice Act, 1948, s. 23, following the observations of Lord Goddard in that case regarding the immediate desirability of amending the section in the case where a previous sentence of preventive detention or corrective training had been imposed upon a person subsequently thereto convicted, so as to make a notice of intention by the police to prove a previous conviction for the purposes of the section sufficient to enable the court to apply its provisions. He (the Home Secretary) had also noted the point for amending legislation when a suitable opportunity occurred. [16th November.

STATUTORY INSTRUMENTS

Census of Distribution (1958) Order, 1956. (S.I. 1956 No. 1733.) 5d.

Draft **Education, Scotland** Central Institutions (Recognition) (Scotland) Regulation, 1956. 5d.

Housing (Payments for Well-Maintained Houses) Order, 1956. (S.I. 1956 No. 1710.) 5d.

Import Duties (Exemptions) (No. 13) Order, 1956. (S.I. 1956 No. 1787.) 5d.

Lands Tribunal Rules, 1956. (S.I. 1956 No. 1734.) 1s. 5d.

London Traffic (Prohibition of Waiting) (Welwyn Garden City) Regulations, 1956. (S.I. 1956 No. 1757.) 5d.

National Health Service (General Medical and Pharmaceutical Services) (Scotland) Amendment (No. 2) Regulations, 1956. (S.I. 1956 No. 1756 (S.80).) 5d.

National Health Service (Hospital Charges for Drugs and Appliances) (Scotland) Amendment Regulations, 1956. (S.I. 1956 No. 1755 (S.79).) 5d.

Penrith–Middlesbrough Trunk Road (Bowes By-Pass) Order, 1956. (S.I. 1956 No. 1738.) 5d.

Retention of Cable and Main under Highway (Buckinghamshire) (No. 1) Order, 1956. (S.I. 1956 No. 1754.) 5d.

Retention of Cable under Highway (Northamptonshire) (No. 1) Order, 1956. (S.I. 1956 No. 1753.) 5d.

Retention of Cables and Mains under Highways (Leicestershire) (No. 1) Order, 1956. (S.I. 1956 No. 1722.) 5d.

Retention of Pipe under Highway (Huntingdonshire) (No. 3) Order, 1956. (S.I. 1956 No. 1748.) 5d.

Safeguarding of Industries (Exemption) (No. 8) Order, 1956. (S.I. 1956 No. 1735.) 5d.

Stopping up of Highways (Bristol) (No. 9) Order, 1956. (S.I. 1956 No. 1751.) 5d.

Stopping up of Highways (Buckinghamshire) (No. 10) Order, 1956. (S.I. 1956 No. 1752.) 5d.

Stopping up of Highways (Derbyshire) (No. 11) Order, 1956. (S.I. 1956 No. 1737.) 5d.

Stopping up of Highways (Derbyshire) (No. 16) Order, 1956. (S.I. 1956 No. 1723.) 5d.

Stopping up of Highways (Essex) (No. 29) Order, 1956. (S.I. 1956 No. 1724.) 5d.

Stopping up of Highways (Gloucestershire) (No. 16) Order, 1956. (S.I. 1956 No. 1749.) 5d.

Stopping up of Highways (Hastings) (No. 2) Order, 1956. (S.I. 1956 No. 1725.) 5d.

Stopping up of Highways (London) (No. 40) Order, 1956. (S.I. 1956 No. 1726.) 5d.

Stopping up of Highways (London) (No. 41) Order, 1956. (S.I. 1956 No. 1727.) 5d.

Stopping up of Highways (Surrey) (No. 9) Order, 1956. (S.I. 1956 No. 1728.) 5d.

Stopping up of Highways (West Riding of Yorkshire) (No. 21) Order, 1956. (S.I. 1956 No. 1729.) 5d.

Stopping up of Highways (West Suffolk) (No. 2) Order, 1956. (S.I. 1956 No. 1730.) 5d.

Swine Fever (Infected Areas Restrictions) Order, 1956. (S.I. 1956 No. 1750.) 7d.

Draft **Teachers Superannuation** (Royal Naval College, Dartmouth) Amending Scheme, 1956. 5d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

OBITUARY

MR. G. E. BARFORD

Mr. George Edmund Barford, retired solicitor, formerly town clerk of Chelmsford, died on 9th November, aged 73. He was admitted in 1913.

MR. R. P. HELLYAR

Mr. Richard Percival Hellyar, solicitor, of Bristol, died on 4th November, aged 75. He was admitted in 1905.

MR. H. D. IRWIN

Mr. Henry Dillon Irwin, formerly assistant solicitor to Northumberland County Council, of Gosforth, Newcastle upon Tyne, died on 12th November, aged 86.

MR. E. M. ROLLINSON

Mr. Ernest Mark Rollinson, retired solicitor, of Uckfield, died on 13th November, aged 87. He was admitted in 1893.

PRINCIPAL ARTICLES APPEARING IN VOL. 100

6th October to 24th November, 1956

Lists of articles published earlier this year appear in the Interim Index (to 30th June) and at p. 718, *ante* (7th July to 29th September)

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 21 Red Lion Street, London, W.C.1. Telephone: CHAncery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

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